IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2009 Session

DOUG GOSS, ET AL. v. TOMMY BURNEY HOMES, INC.

Appeal from the Chancery Court for Montgomery County
No. MC CH CV CD 07-7 Laurence M. McMillan, Jr., Chancellor

No. M2008-02376-COA-R3-CV - Filed September 2, 2009

Purchasers contracted with a builder to construct and sell them a semi-custom built home; purchasers were permitted to make certain material selections, but were required to pay in advance for any upgrades. During construction, there were several delays some of which were caused by the builder while others were caused by the purchasers. One particular delay was caused by the purchasers' decision to select a quartz material for the kitchen counter-tops. When the construction was completed, the builder assessed the purchasers an overage charge of $3,047.69 for interest which had accrued on the builder's construction loan as a result of the delay caused by the purchaser's selection of the quartz counter-tops. The purchasers refused to pay this charge and asked the builder to correct certain things in the home prior to closing. Without giving any notice or attempting to reschedule, the purchasers failed to attend the closing and subsequently filed suit against the builder for breach of contract and conversion of property. The builder denied that it had breached the contract and filed a counter-claim alleging that the purchasers had breached the contract. At trial, the jury found that the purchasers breached the contract. The purchasers appeal, asserting that the weight of the evidence does not support the jury's verdict; purchasers also appeal certain evidentiary rulings made by the trial court. We affirm the jury's verdict and the judgment of the trial court.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Todd E. Panther and Stephen A. Lund, Nashville, Tennessee, for the appellants, Doug Goss and Bethany Goss.

Mart G. Fendley, Clarksville, Tennessee, for the appellee, Tommy Burney Homes, Inc.

OPINION

I. Background

In February 2006, Doug and Bethany Goss approached Ms. Joanna Barnes, the sales representative for Tommy Burney Homes, Inc. ("TBH"), about purchasing an unimproved lot and constructing a home in The Villages subdivision in Clarksville, Tennessee. TBH owned the lots and was the exclusive developer of the homes in ths subdivision, most of which were semi-custom built homes.[1] On March 15, the Gosses signed a "Purchase and Sale Agreement" (the "Contract") with TBH to construct and sell a semi-custom built home on Lot 140.

The Gosses expressed to Ms. Barnes and Mr. Burney that it was important to them to construct the home and close on the sale as soon as possible and asked for a September closing date. Mr. Burney told the Gosses he believed he could complete the construction in approximately five to six months. Accordingly, the Contract set the closing date no later than 180 days after the "start date," which was defined as the date the foundation was poured. The foundation was poured on April 6; however, the parties agreed that the closing date would be scheduled for October 31.

At the time they signed the Contract, the Gosses chose a floor plan, which they then modified, and made certain baseline material selections such as whether they wanted laminate or tile. Based on the value of the lot, which was $50,000.00, as well as the floor plan and materials selected by the Gosses, the Contract established the home's purchase price would be $278,881.00. The Gosses paid a $10,000.00 non-refundable lot deposit, which was to compensate TBH for removing the property from the market and which was to be deducted from the final purchase price.

Once construction began, the Gosses were asked to make specific material selections in accordance with the construction schedule. The Contract required the Gosses to make material selections in a timely manner so as not to delay the construction process. The Gosses met regularly with Ms. Barnes to discuss the construction calendar and were notified when it was time for them to make certain material choices. Ms. Barnes would then give them a deadline for making their decision. If the Gosses chose a material that was more expensive than their original selection or an extra material selection and Mr. Burney agreed to make the changes the Contract permitted TBH to require the Gosses to pay any such overages in advance. Under the Contract any amounts paid to TBH for overages were forfeited by the Gosses if they failed to close for any reason other than default by TBH. TBH's method of documenting selections and overages was through change orders, which were signed by both parties and listed the date, selection and amount due.

From the beginning of construction there were many delays, some of which were construction related while others were caused by the Gosses' failure to make material selections in a timely

[1] A semi-custom built home is one in which the purchaser can modify the floor plan and select finishes such as brick, shingles, cabinets, counter-tops, floor materials, and paint.

manner. By late August, however, TBH had been able to make up the time for the delays and construction was on schedule to close by the end of October.

Towards the end of August, Ms. Barnes told the Gosses that it was time for them to make their final kitchen cabinet and counter-top selections. The Gosses had contracted to do a tiled counter-top, but had discovered a new material, quartz,[2] that they wanted installed instead. Ms. Barnes informed the Gosses that TBH had never used quartz and would need to do some research about the material. After conducting some research and talking with Mr. Burney, Ms. Barnes told the Gosses that TBH would agree to do a quartz counter-top, however, installation of the quartz would delay completion of the home by up to six weeks.[3] Ms. Barnes explained that if they wanted to go forward with the quartz, TBH would expect the Gosses to pay for any costs associated with the delay, including interest that would accrue on TBH's construction loan if the closing were delayed. The Gosses confirmed on September 1 that they wanted the quartz counter-tops regardless of delay.

On September 5, Ms. Barnes presented the Gosses with a change order ("Change Order E") which listed the estimated cost of the counter-top upgrade as well as a line item for the interest that TBH would accrue on its construction loan between the original closing date, October 31, and whenever the actual closing date occurred (the "holding costs"). The change order did not list an amount for the holding costs, however, because at the time TBH did not know how much of a delay the quartz installation would cause. The Gosses told Ms. Barnes that they did not believe they were required to pay the holding costs and, as a result, Ms. Barnes tore up the original Change Order E and wrote a new one that did not list holding costs as a line item. Mrs. Goss signed the change order. Change Order E was later revised on October 24, because additional quartz material had to be ordered. The revised version likewise did not list holding costs as a line item.

On November 20, TBH recorded a Notice of Completion[4] in the Register's office and Ms. Barnes attempted to schedule a closing date. The Gosses told Ms. Barnes they were unavailable to close on the dates she suggested and their lender ultimately scheduled the closing for Monday, December 18, at 8:00 a.m.

In early December, the Gosses hired a home inspector, Tim Hicks, to make a visual inspection of the home. The home inspection was completed on December 7, and the inspector's report noted that while the property was undergoing the final stages of construction at the time of

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[2] Quartz is a natural stone material that is manufactured into counter-tops using a patented process; the resulting product is typically around 93% quartz.

[3] The delay was apparently due to the fact that installation of quartz was a multi-step process whereby the quartz is manufactured, then once the cabinets are installed a template must be drawn and the quartz cut according to the template. The quartz is then installed as a single slab.

[4] A Notice of Completion is a document filed with the County Register's office notifying all suppliers, vendors, and subcontractors that the construction is complete; the notice is recorded, following which parties have a ten day window to respond to any unpaid bills stemming from the construction.

the inspection there were several areas of concern, including: the general grade around the home was inadequate to direct rainwater away from the foundation; the down-spouts were not connected to the drain extensions; there was some standing water in the crawl space that should be removed and monitored for any moisture intrusion; the dryer vent in the crawl space needed to be extended to the exterior of the home; several electrical outlets needed cover plates installed and one outlet in the bathroom was non-functional as a ground fault circuit interrupter; the exterior window and doors needed to be caulked and exterior doors needed weather stripping; the master bath linen closet needed a strike plate and the front right bedroom door needed the latch repaired; the range hood vent needed to be extended to the exterior of the home; the return filter grill on the first floor needed to be repaired or replaced because of a broken hinge; and the first floor thermostat need to be secured to the wall. The report also recommended that the Gosses consult a professional HVAC contractor to determine the proper placement of the heat pump condenser as the inspection revealed it was too close to the package system exhaust, which could lead to deceased performance and efficiency of the system over time.

On December 9, the Gosses completed a walk-through of the home with Ms. Barnes during which the Gosses generated a punch list of items to be fixed prior to closing. Most of the items on the punch list reflected the areas of concern from Mr. Hicks' inspection report, but Mr. Goss also asked TBH to fix some discoloration in the driveway concrete. Mr. Burney agreed to fix most of the items, although he explained that several would not be completed until after the closing. Mr. Burney told the Gosses that the down-spouts could not be installed until the lot had been graded, which could not be done until the landscaping was started, which the Gosses agreed should not be started until March.[5] Mr. Burney agreed to place in escrow the amount of money it would cost to complete the landscaping, including the grading of the lot and connection of the down-spouts. Mr. Burney also explained that the water in the crawl space was due to the lack of grading and that once the landscaping was done the crawl space water issue would be resolved; in any event, Mr. Burney explained that the crawl space was not intended to be completely dry as would be expected with a basement. Finally, Mr. Burney explained that the coloring of the driveway was not a construction defect and that the coloring would even out over time as the concrete was exposed to sunlight.

On Friday December 15, the Clarksville building and codes department inspected the home and issued a certificate of occupancy. On the same day, Ms. Barnes provided the Gosses with a summary of all outstanding charges from changes or extras and scheduled a second walk-through for the next morning. One of the outstanding charges was for $3,067.69, representing 47 days of holding costs from October 31 accruing at $65.27 per day. This charge was documented by Change Order H. The Gosses told Ms. Barnes that they did not believe they were required by the Contract to pay for TBH's holding costs and they refused to sign Change Order H. On the morning of December 16, the Gosses met Ms. Barnes at the home for the walk-through. Before the walk-through began, however, Ms. Barnes told them that it was TBH's position that the Gosses were required to pay the holding costs at closing and asked them whether they intended to do so. The Gosses indicated that they would not agree to pay the holding costs; as a result, Ms. Barnes

[5] Due to the weather and time of year, the proper time for grass seeding was in March.

terminated the walk-through and asked the Gosses to return the keys to the home they had previously been given. Mrs. Goss gave Ms. Barnes one of her keys, but kept a second key.

Ms. Barnes did not receive any other communication from the Gosses over the weekend and she attended the closing on Monday morning as scheduled. The Gosses, however, never arrived or provided an explanation as to why they did not attend the closing.

On February 9, the Gosses filed suit alleging that TBH repudiated the Contract by asking the Gosses the pay the holding costs on TBH's construction loan and refusing to correct deficiencies in the construction of the home, including the driveway discoloration, lack of grading of the property, and standing water under the home. The Complaint also alleged that TBH converted the Gosses' property, specifically the $10,000.00 lot deposit and $26,119.00 paid by the Gosses to TBH for the upgrades installed in the home. On April 13, the court entered an agreed order allowing the sale of the property. On May 21, TBH filed an Answer and Counter-Complaint alleging that the Gosses breached the contract by refusing to close on the sale of the home, refusing to pay the holding costs, and failing to cooperate and make timely decisions as required by the Contract. TBH also deposited $36,119.00 with the court clerk's office.

A jury trial was held on April 21 - 24, 2008, during which testimony was given by Mrs. Goss, Ms. Barnes, Mr. Burney, Tim Hicks, and an appraiser, Gary Bridges. The jury found that TBH did not breach the contract and did not convert the Gosses property. The jury further found that the Gosses breached the contract and awarded TBH the $36,119.00 held by the clerk's office in damages. The trial court entered a judgment on May 28, following which the Gosses filed a Motion for Judgment Nothwithstanding the Verdict, or, in the Alternative, for a New Trial. The trial court denied the Gosses' motion on September 22 and the Gosses appeal.

The Gosses contend that the trial court's judgment should be reversed because there was no material evidence to support the jury's verdict. The Gosses also contend that during the trial, the court made several erroneous evidentiary decisions including admitting parol evidence, admitting hearsay evidence, and excluding five exhibits pursuant to Tenn. R. Evid. 408, all of which they contend affected the outcome of the trial.

II. Analysis

Jury Verdict

The Gosses contend that there was no material evidence to support a finding that the Gosses breached the Contract by either failing to cooperate and timely act under the Contract, refusing to pay holding costs, or failing to attend the closing. The Gosses also contend that there was "evidence at trial showing that TBH first breached the Contract."

When jury trials are involved, our task is to determine whether there is any material evidence to support the jury's verdict. *See Harper v. Watkins*, 670 S.W.2d 611, 631 (Tenn. Ct. App. 1983);

Lassetter v. Henson, 588 S.W.2d 315, 317 (Tenn. Ct. App. 1979); *see also* Tenn. R. App. P. 13(d). Moreover, "we must take the strongest legitimate view of all the evidence to uphold the verdict, assume the trust of all that tends to support it and discard all to the contrary. We are bound to allow all reasonable inferences to sustain the verdict, and, if there is any material evidence to support the verdict, we must affirm." *Harper*, 670 S.W.2d at 631. We do not reweigh the evidence. *See Electric Power Bd. v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985).

We find that there was material evidence to support the jury's verdict. Paragraph 8 of the Contract provided as follows:

> It is understood and agreed between the parties that Seller shall be deemed to have performed this contract as to construction of the improvements when a clear final inspection has been obtained from the FHA and/or DVA and/or the proper governmental authorities. . . . Purchasers shall completely inspect residence prior to closing and/or engage a qualified home inspector at Buyer's expense. Any inspector must be acceptable to Seller. Seller or Seller's Agent will meet with Purchaser and/or Purchaser's inspector with all utilities on and all systems working. Purchaser and Seller shall agree in writing, those items that will be repaired or completed within a reasonable time. Seller will make his best effort to correct all reasonable defects; however, it may not be possible to do so prior to closing. Purchaser agrees to immediately close this transaction and purchase the above described property within ten (10) working days after the completion of the property. Failure of the Purchaser to close within said time frame set forth above may result in the forfeiture of all monies paid to Seller, and/or other damages against the Purchaser.

At trial, the evidence showed that the Notice of Completion was filed on November 20 and the Clarksville building and codes departments completed its final inspection approving the home for residential occupancy on December 15. The evidence also showed that the Gosses's home inspector inspected the residence and the Gosses had completed the walk-through, they often visited the home during construction and had continuous contact with Ms. Barnes. Consequently, everything required by the Contract prior to closing had been accomplished. The evidence at trial also showed that the Gosses knew of the date and time of the closing, that some of the punch list items could not be corrected prior to closing and that such was permitted by the Contract and, finally, that they had an obligation to close on the sale of the home "immediately" or at least within ten working days after the completion of the property. Despite this, the Gosses did not attend, provide notice that they would not attend, or attempt to reschedule the closing. Accordingly, we find there was material evidence to support the jury's verdict.

Admission of Parol Evidence

The Gosses contend that the trial court erred in admitting Ms. Barnes' testimony about the parties' oral negotiations prior to executing Change Order E, specifically Ms. Barnes' testimony "that prior to signing Change Order E, she told the Gosses that by signing the change order they were

agreeing to pay holding costs after October 3[1], 2006." They also contend that Change Order E, which documented the quartz selection and $6,000.000 in overages but did not include the holding costs, was an independent, written contract; consequently, the parol evidence rule prohibits evidence of the negotiations leading up to the signing of Change Order E. TBH responds that the testimony in question was not parol evidence because holding costs were permissible charges under the Contract and that Ms. Barnes' testimony was introduced to show that TBH intended to charge the Gosses for TBH's out-of-pocket expenses resulting from the Gosses' decision to upgrade their counter-top selection to quartz. Alternatively, TBH contends, if the testimony in question was parol evidence, it was admissible under the equitable estoppel exception to the parol evidence rule.

The parol evidence rule is a rule of substantive law intended to protect the integrity of written contracts. *Maddox v. Webb Constr. Co.*, 562 S.W.2d 198, 201 (Tenn. 1978). "Since courts should not look beyond a written contract when its terms are clear, the parol evidence rule provides that contracting parties cannot use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract." *GRW Enterprises, Inc. v. Davis*, 797 S.W.2d 606, 610 (Tenn. Ct. App. 1990) (internal citations omitted); *see also Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn. 1985); *Clayton v. Haury*, 224 Tenn. 222, 226, 452 S.W.2d 865, 867 (1970); *Newark Ins. Co. v. Seyfert*, 54 Tenn.App. 459, 484, 392 S.W.2d 336, 348 (1964).

While the rule is broad, "courts have been reluctant to apply it mechanically" such that now there are numerous exceptions and limitations, including equitable estoppel. *GRW Enterprises*, 797 S.W.2d at 610; *see also* Feldman, Steven W., 21 *Tenn. Prac. Contract Law and Practice* § 8:52 (2009). The rule does not prevent using extraneous evidence to prove the existence of an agreement made after an earlier written agreement or to prove the existence of an independent or collateral agreement not in conflict with a written contract. *GRW Enterprises*, 797 S.W.2d at 610; *Brunson v. Gladish*, 10 Beeler 309, 174 Tenn. 309, 125 S.W.2d 144, 147 (1939). As a rule of substantive law, we review the trial court's determination of whether evidence is or is not subject to the parol evidence rule *de novo* with no presumption of correctness. *See* Tenn. R. Civ. P. 13(d).

During the trial, Ms. Barnes was asked about the events surrounding the Gosses' decision to select quartz counter-tops. The Gosses objected to Ms. Barnes' testimony based on the grounds that any testimony by Ms. Barnes "relating to a so-called collateral agreement or a modification whereby the Gosses assented to a change in the construction agreement or the purchase agreement whereby they would pay some holding costs . . . would violate the parole [sic] evidence rule, that it would go beyond the four corners of the document." TBH responded that Ms. Barnes' testimony was not parol evidence because, TBH contended, the holding costs were a permissible charge under paragraphs 8, 10, 12(E) and 15 of the Contract. The trial court found that the discussions and negotiations related to the quartz counter-top selection and holding costs, were a "subsequent modification" of the original Contract and, as such, outside the scope of the parol evidence rule.

The Contract expressly provided for change orders in paragraph 10 stating, "[r]equest for changes and/or extras desired by the Purchaser must be made in writing to Seller and agreed upon by both the Purchaser and the Seller. The Seller may require, at his sole option, that Purchaser pay

on demand the cost for said extras prior to the change being made. In the event Purchaser fails to close for any reason other than default of the Seller, Seller shall retain all funds paid for said extras and changes, without reimbursement to Purchaser." Paragraph 12(E) of the Contract required the Gosses to cooperate by "timely tak[ing] such actions and produce, execute, and/or deliver such information and documentation as is reasonabl[y] necessary to carry out the responsibilities and obligations of this Agreement." Paragraphs 8 and 15 permitted TBH to keep all monies paid for changes or extras in the event the Gosses breached the Contract. The only mention of delay in the Contract is in paragraph 5(A) that establishes the closing date to be "180 days from the start date, subject to being extended due to events beyond the control of the Builder, including but not limited to weather delays, acts of God, labor disputes, material shortages etc., or on such earlier date as may be agreed to by the parties in writing. Any extension of this date must be agreed to by the parties in writing." There is no clause expressly permitting TBH to assess the Gosses a charge for delay.

Ms. Barnes testified to the following:

> I told [the Gosses] that I had been instructed that because Mr. Burney had made every effort up to that point to comply with their imperative that we had [the home] completed as soon as possible, but no later than at the end of October, including jumping through some hoops to make up for some delays that they had caused; that he was not going to be responsible for any additional cost after the October 30the date; that those delays that would be caused by the installation of the quartz countertop would become an additional cost. Just like any other overage or upgrade, it's something extra that you're asking for outside the contract, therefore, that would be their responsibility. ... Their decision was to go forward with the countertops.

Given that the Contract only permitted TBH to demand payment for the cost of a requested change, extra or overage, but made no mention of cost of delay whether or not the delay was caused by the change, extra or overage, Ms. Barnes' testimony that the Gosses assented to pay holding costs by choosing to go forward with their selection of quartz for the counter-top was parol evidence and should not have been admitted. We find, however, that this error was harmless because the jury did not award TBH damages for holding costs.[6]

Other Evidentiary Issues

The Gosses contend that the trial court made several other erroneous evidentiary decisions during the course of the trial that affected the outcome. Specifically, the Gosses contend that the trial court erred in admitting seven emails in violation of Tenn. R. Evid. 802; in omitting four letters in

[6] TBH contends that if Ms. Barnes' testimony was parol evidence that it would nevertheless be admissible as an exception to the parol evidence rule because it was introduced to show that having chosen the quartz despite Ms. Barnes' explanation of the consequences, the Gosses' were estopped from asserting at trial that they should not be required to pay holding costs beyond October 31, 2006. We need not determine whether the testimony falls within the equitable estoppel exception to the parol evidence rule since we determined the admission of the evidence was harmless error.

violation of Tenn. R. Evid. 408; and in determining that those same letters and one additional letter as redacted were cumulative evidence and, thus, inadmissible.

1. Admission of Hearsay Evidence

During Ms. Barnes' direct examination, TBH sought to introduce into evidence several email messages between Ms. Barnes and Mr. Burney in which they discussed the Gosses' failure to make their material selections in a timely manner. The trial court overruled the Gosses' hearsay objections, holding the emails were admissible as business records within the meaning of Tenn. R. Evid. 803(6).

Under the Tennessee Rules of Evidence, evidence that is hearsay is inadmissible, *see* Tenn. R. Evid. 802, unless it satisfies one of the enumerated exceptions in Tenn. R. Evid. 803. Business records may be admissible as an exception to the hearsay rule. Tenn. R. Evid. 803(6). To admit a business record, it must meet the following requirements:

> (1) A memorandum, report, record, or data compilation in any form,
> (2) Of acts, events, conditions, opinions or diagnosis,
> (3) Made at or near the time of the occurrence,
> (4) By or from information transmitted,
> (5) By a person with
> (a) Knowledge and
> (b) A business duty to record or transmit,
> (6) If kept in the course of a regularly conducted business activity,
> (7) And it was the regular practice of that business activity to make the memorandum, etc.
> (8) All of the above must be shown by the testimony of the custodian or other qualified witness or by a certification that complies with Tenn. R. Evid. 902(11)[7] or a statute permitting certification.

See Tenn. R. Evid. 803(6).

The Gosses contend that the trial court erred in admitting the emails because TBH failed to prove that Ms. Barnes had a business duty to record or transmit the communications in question. We disagree. In laying the foundation for introducing the emails, Ms. Barnes testified that she and

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[7] Tenn. R. Evid. 902(11) provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required as to . . .: The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person certifying that the record-

> (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit those matters;
> (B) was kept in the course of the regularly conducted activity; and
> (C) was made by the regularly conducted activity as a regular practice."

Mr. Burney had worked together for more than ten years and had discovered during that time that it was critical to the success of a project that they document the process including interactions with home purchasers. As a result, they had established a system whereby they would communicate by email to each other and Ms. Barnes would print out all the emails related to a project and place them in the project file as a record. Mr. Burney confirmed this documentation and recording system in his testimony. The emails themselves also confirm this system of record-keeping as many of them state that the email is for the purpose of "documenting for the file." The evidence supports the conclusion that these were business records and properly admitted.

2. Exclusion of Identification Exhibits 18, 20, 21 and 22

During Mrs. Gosses' direct examination, the Gosses attempted to admit into evidence four letters from the Gosses' attorney to TBH's attorney between December 21, 2006, and January 23, 2007. TBH objected to their admission based on the ground that the letters contained offers of settlement and were, thus, inadmissible under Tenn. R. Evid., Rule 408; the court sustained the objection. The Gosses then offered to redact the portions of the letters that offered resolutions to the disputes between the Gosses and TBH "in order to show that Tommy Burney Homes had notice of the Gosses' intention to close and notice of defects in the property;" upon viewing the redacted version of the letters, the court excluded them as cumulative. The Gosses contend that the trial court erred in excluding the letters as they contained only their own offers of settlement, not those made by TBH.

Tennessee Rules of Evidence 408 provides:

> Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence actually obtained during discovery merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations.

Rule 408 is intended to encourage settlement of suits by forbidding a party from pointing to an opponent's settlement offer as proof that the opponent thought he would lose. *Vafaie v. Owens*, No. 92C-1642, 1996 WL 502133, at *8 (Tenn. Ct. App. Sept. 6, 1996) (citing *Evans v. Troutman*, 817 F.2d 104 (6th Cir. 1987)). When the settlement offeror is the same party attempting to gain the admission of the settlement letter into evidence, the threat of admission is no longer a deterrent. *Id.*

(citing *Bulaich v. AT&T Information Sys.*, 778 P.2d 1031, 1036 (Wash. 1989); *Crus v. KFC Corp.*, 768 F.2d 230, 233-34 (8th cir. 1985)). Accordingly, where, as here, letters of compromise were offered by the same party seeking their admission, the letters should not have been excluded on the basis of Tenn. R. Evid. 408. *See Vafaie*, 1996 WL 502133, at *8.

While the trial court should not have excluded the letters under Rule 408, it was within the trial court's discretion to determine whether the evidence should be excluded on other grounds. The Gosses redacted the letters to omit the letters' references to settling the Holding Cost issue and sought admission of the letters for the purpose of showing that the Gosses wanted to close on the home after December 18, 2006, and that TBH had notice of alleged construction defects. The Gosses contend this evidence was relevant to disprove TBH's allegation that the Gosses breached the Contract by failing to close and to prove their allegation that TBH breached the Contract by "fail[ing] to adequately address the deficiencies in the construction of the home."

The admission or exclusion of evidence is within the sound discretion of the trial court. *White v. Vanderbilt Univ.*, 21 S.W.3d 215 (Tenn. Ct. App. 1999); *see Seffernick v. Saint Thomas Hosp.*, 969 S.W.2d 391, 393 (Tenn.1998); *Otis v. Cambridge Mut. Fire Ins. Co.*, 85 0 S.W.2d 439, 442 (Tenn.1992). Because, by their very nature, discretionary decisions involve a choice among acceptable alternatives, reviewing courts will not second-guess a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen. *White v. Vanderbilt Univ.*, 21 S.W.3d at 222*; Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999). Thus, a trial court's discretionary decision should be reviewed to determine: (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives. *White v. Vanderbilt Univ.*, 21 S.W.3d at 223; *BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *3 (Tenn. Ct. App. July 13, 1988). Appellate courts should permit a discretionary decision to stand if reasonable judicial minds can differ concerning its soundness. *White v. Vanderbilt Univ.*, 21 S.W.3d at 223; *Overstreet v. Shoney's, Inc.*, 4 S.W.3d at 709.

The trial court determined that the letters provided only cumulative evidence because Mrs. Goss had testified that she and her husband wanted to close on the home after they failed to attend the scheduled closing on December 18, 2006, and Mrs. Goss had introduced several exhibits during her direct examination that showed TBH knew of the alleged construction defects. Consequently, we do not find that the trial court abused its discretion in excluding the letters.

3. Exclusion of Identification Exhibit 19

The Gosses contend that the trial court erred in excluding the redacted version of ID Exhibit 19, a December 28, 2006, letter from TBH's attorney to the Gosses' attorney in response to the Gosses' attorney's December 21 settlement offer letter to TBH's attorney. The redacted version omitted all references to settlement offers in the letter and was offered "as proof that Tommy Burney Homes received notice of the defects complained of by the Gosses." The trial court found this

evidence was cumulative and we do not find that the trial court abused its discretion by excluding the redacted letter.

III. Conclusion

For the foregoing reasons, the verdict of the jury and judgment of the trial court entered thereon is affirmed.

Costs of the appeal are taxed to Doug and Bethany Goss for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE